TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~699~~ 184.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 20, 1905.

(19,639.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 539.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 & 2 Please Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 15th Day of December, 1904.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, Second Division.

Be it remembered that heretofore towit, on the 1st day of November 1904, the appellant by his attorney, filed in the clerk's office of the court of appeals, a transcript of the record, in words and figu-es, as follows, towit :—

3 TRANSCRIPT OF RECORD.

STATE OF KENTUCKY, County of Jefferson.

Pleas before the Honorable Sam'l B. Kirby, Judge of the Jefferson Circuit Court, Chancery Branch, Second Division, at the Court House, on the Dates Hereinafter Mentioned.

Jefferson Circuit Court, Second Chancery Division.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, Connecticut,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.
Transcript of Record.

Be it remembered, that heretofore, to-wit, on October 10, 1904, came the plaintiff and filed its verified petition in the office of the clerk of the aforesaid court, which said petition is in words and figures as follows, to-wit :

4 Jefferson Circuit Court.

THE TRAVELERS INSURANCE COMPANY OF Hartford, Connecticut, Plaintiff,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant.
No. 38367. Petition in Equity.

Plaintiff states that it is a corporation created by and organized under and pursuant to the laws of the State of Connecticut with

usual corporate powers and empowered to transact the business of insurance in said State and elsewhere, and has for many years transacted said business of insurance in the State of Kentucky under the authority of the commissioner of insurance of the State of Kentucky, and that the defendant, Henry R. Prewitt is now and has for years last past been insurance commissioner of the State of Kentucky.

Plaintiff states that before transacting said insurance business in Kentucky it returned to said commissioner of insurance a copy of its charter or articles of association, made deposit of and has since maintained the capital or reserve required by the said commissioner and by the insurance department of the State of Kentucky, has filed with the said commissioner a resolution adopted by its board of directors consenting that the service of process upon any of its agents in this State or upon the commissioner of insurance of this
5 State in any action brought or pending in this State should be valid service upon plaintiff, and in every other respect has always fully complied with the laws of the State of Kentucky.

Plaintiff further states that on or about the 1st day of July, 1904, the defendant granted to plaintiff the authority to transact the insurance business aforesaid in the State of Kentucky for a period of one year thence next ensuing and issued to all of plaintiff's agents licenses to transact said business, and that said authority and other licenses are still in force and effect and that plaintiff's said agents are now transacting said business of insurance.

Plaintiff states that all the things aforesaid are well known to defendant and recognized by defendant and that notwithstanding the laws aforesaid defendant has notified plaintiff that he has on file a complaint that plaintiff has removed a case from the Jefferson circuit court to the circuit court of the United States for the western district of Kentucky and for that reason alone defendant threatens to revoke the authority of plaintiff to transact insurance business in Kentucky and to revoke the licenses issued to plaintiff's agents.

That said communication from defendant refers to a certain action No. 37160 instituted against the plaintiff in the Jefferson circuit court by Abram Frankel and others, wherein plaintiff filed its petition and bond for removal within twenty days after the institution of said action. That the said commissioner has not yet revoked the authority of plaintiff to transact business in Kentucky, nor revoked the licenses issued to plaintiff's agents as the plaintiff has not yet filed a transcript of the record in said case in the United States circuit court aforesaid. Plaintiff says that under the laws of the United States it is required to file the said record in the said circuit court of the United States on the first day of its session which begins on this the tenth of October, 1904, and that said defendant threatens to and unless enjoined by this court
6 will revoke the authority of plaintiff to do business in the State of Kentucky and revoke the licenses of its agents to transact said business in Kentucky, notwithstanding plaintiff's compliance with the provisions of the laws of the State of Kentucky

because and solely because of the plaintiff's filing in said circuit court of the United States said transcript and perfecting the removal of the case aforesaid from the said Jefferson circuit court.

Plaintiff states that its right to remove the said action from the Jefferson circuit court to the said United States circuit court is a right guaranteed to plaintiff by the Constitution and laws of the United States, and that any law of any State to the contrary would be null and void, and that the revocation of plaintiff's authority to transact business and of the licenses to its agents to transact business in Kentucky would deprive the plaintiff of a right guaranteed to it by the Constitution and laws of the United States and deprive the plaintiff of the equal protection of the laws and constitute a violation and infraction of plaintiff's rights guaranteed to it by the Constitution of the United States and by the act of Congress in such cases made and provided. The plaintiff invokes the protection of the said United States Constitution and laws.

Plaintiff further states that its business in Kentucky is worth many thousands — dollars to plaintiff and that revocation of its authority to transact business of insurance and of the licenses issued to its agents as aforesaid would produce great and irreparable injury and damage to plaintiff irremediable by any action at law, but remediable only in equity.

Plaintiff states that neither the restraining order nor the injunction herein prayed for has been asked of or refused by any court or other officer.

Wherefore plaintiff prays that defendant, Henry R. Prewitt,
7 insurance commissioner of the State of Kentucky, be enjoined and restrained from revoking plaintiff's authority to transact the business of insurance in the State of Kentucky and from revoking the licenses issued to plaintiff's agents and from refusing to issue licenses to other agents whom plaintiff may appoint, and from refusing to renew at expiration thereof plaintiff's said authority and said licenses issued to plaintiff's agents so long as plaintiff complies with the provisions of the laws of the State of Kentucky in force in said State, plaintiff prays for a temporary restraining order, for a preliminary or interlocutory injunction, for a perpetuation of such injunction upon final hearing of its petition, for plaintiff's costs herein incurred and all general and proper relief.

PIRTLE, TRABUE, DOOLAN & COX,
Attorneys for Plaintiff.

R. M. Ferguson states that he is the principal officer and agent of the plaintiff, The Travelers' Insurance Company of Hartford, Connecticut, in this county and State at this time, and that the statements contained in the foregoing petition are true as he verily believes.

R. M. FERGUSON.

Subscribed and sworn to before me by R. M. Ferguson this 10th day of October, 1904. My commission expires February 15, 1908.

V. C. YEAGER,
Notary Public, Jefferson County, Ky.

At a court held October 29, 1904:

It appearing that on October 11, 1904, the defendant, Henry R. Prewitt, filed herein his demurrer to the petition and that said demurrer was marked filed by the clerk, and was argued orally
8 before the court and briefed, and the cause submitted, but no order was entered upon the order book.

It is now ordered by consent that said demurrer be and the same hereby is filed and the cause submitted *nunc pro tunc* as of October 11, 1904.

Said demurrer is in words and figures as follows, to-wit:

Jefferson Circuit Court.

THE TRAVELERS INSURANCE COMPANY, Plaintiff, vs. HENRY R. PREWITT, Defendant. } No. 38367. Demurrer.

The defendant demurs to the petition herein because it does not state facts sufficient to constitute a cause of action against him.

H. R. PREWITT, Com'r.

At a court held October 29, 1904:

This cause having been submitted upon the defendant's demurrer to the petition and the court being advised delivered an opinion which is filed herewith and made a part of the record.

It is thereupon ordered that said demurrer be and the same hereby is sustained, to which the plaintiff objected and excepted.

The said opinion is in words and figures as follows, to-wit:

9 Jefferson Circuit Court, Chancery Branch, Second Division.

THE TRAVELERS INSURANCE COMPANY OF Hartford, Connecticut, Plaintiff, vs. HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant. } No. 38367. Opinion.

The plaintiff is a foreign corporation, organized under the laws of the State of Connecticut, with power to transact the business of insurance. It has complied with the laws of the State of Kentucky,

and was, on July 1 1904, granted authority to transact the business of insurance in Kentucky, for a period of one year.

It is alleged in the petition that the plaintiff has removed a certain cause from a State court to the circuit court of the United States for the western district of Kentucky, and for that reason alone, the defendant, who is the insurance commissioner of Kentucky, threatens to revoke the authority of plaintiff to transact the business of insurance in Kentucky, and to revoke the license issued to plaintiff's agents.

An injunction is prayed to restrain the insurance commissioner from revoking the license, upon the ground that section 631 of the Kentucky Statutes is in conflict with the Constitution of the United States, and the laws passed pursuant thereto, and is, therefore, void.

10 The language of the statute is as follows:

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution, adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance in this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it, in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke the authority of such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

A temporary restraining order was issued by this court and the question arises upon the demurrer to the petition and upon plaintiff's motion for a temporary injunction.

The general rights of the State to admit or exclude foreign corporations, not engaged in interstate commerce, or otherwise protected by the Federal law, are too well understood and too firmly established for discussion here.

Paul *v.* Virginia, 8 Wall., 168;
Ducat *v.* Chicago, 10 Wall., 410;
Lafayette Ins. Co. *v.* French, 18 How., 404, and numerous other authorities.

11 In Doyle *v.* Continental Insurance Company, 94 U. S. page 540, the court said:

"The cases of Bank of Augusta *v.* Earle, Ducat *v.* Chicago, Paul *v.* Virginia and Lafayette Insurance Co. *v.* French, establish the principle that a State may impose upon a foreign corporation, as a

condition of coming into or doing business within its territory, any terms, conditions and restrictions, it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named.

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. Rector *v.* Philadelphia, 24 How., 300; People *v.* Roper, 55 N. Y., 629; People *v.* Commissioners, 47 N. Y., 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. Humphrey *v.* Pegues, 16 Wall., 244; Tomlinson *v.* Jessup, 15 *id.*, 454.

"A license to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens, and its business belong to the State.

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it can not be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin, is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever
12 may be the result, it can not be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world."

This case (Doyle *v.* Ins. Co.), was an action identical in every detail with the one at bar.

"The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its State court into the Federal court, contrary to the provisions of the act of 1870, it shall be the duty of the Secretary of State immediately to cancel its license to do business within the State. If the State has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made."

It is urged that this case was overruled by the subsequent case of Barron *v.* Burnside, 121 U. S., p. 186. An examination of that case will show that the court did not withdraw that opinion, or overrule the case, but simply distinguished the case then under consideration from the former one, and announced its adherence to the former ruling in the following language:

"The case of Doyle *v.* Continental Insurance Company, 94 U. S., 535, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in Insurance Co. *v.* Morse,

and was satisfied with it. In referring to the second conclu-
13 sion in Insurance Co. *v.* Morse, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said in Doyle *v.* Continental Insurance Co., that it referred to that portion of the statute which required a stipulation not to transfer causes to the court of the United States. In that case, which arose under the same statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license to do business in the State. Afterwards, it removed into the Federal court a suit brought against it in a State court of Wisconsin. The State authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree and dismissed the bill. The point of the decision seems to have been, that, as the State had granted the license its officers would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. *v.* Morse, must be regarded as not in judgment."

An examination of the statement of facts in Barron *v.* Burnside, shows that it grew out of the arrest and incarceration of a railroad locomotive engineer, employed by a "foreign corporation," which had not taken out a license or otherwise complied with the statutory requirements of the State of Wisconsin. The statute is quoted
in full, and by its terms imposes a fine of one hundred dol-
14 lars. The question arose upon a trial of a writ of *habeas corpus*. Attention is called to the facts in that case, because, after all, as said by the Supreme Court of the United States, an opinion must be considered in the light of the facts recited. The facts in that case differ materially from the facts in the case of Doyle *v.* Continental Insurance Company. That the latter case has not been overruled, or the principles announced therein abandoned, is shown by the fact that the Supreme Court of the United States has frequently since referred to that case as an authority. (142 U. S., 545; 144 U. S., 236; 175 U. S., 146.) Also, see Rose's notes, vol. 9.

If the Supreme Court had intended to overrule the Doyle case, it could have easily said so. Instead of that it said:

"The point of the decision (Doyle *v.* Ins. Co.), seems to have been that, as the State had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the ad-

judication in Insurance Co. *v.* Morse, must be regarded as not in judgment."

In other words, it approved the ruling that an injunction would not be granted to restrain an officer of the State from revoking a license to a foreign insurance company.

It has been urged by counsel for plaintiff that the court of appeals of Kentucky, in the case of Commonwealth *v.* East Tennessee Coal Company, 97 Ky., 238, having held section 572 of the Kentucky Statutes in conflict with the Constitution of the United States, that it must follow, for the reasons announced in that opinion, that section 631, now under consideration, must also be held unconstitutional and void.

15 The action referred to was brought by the Commonwealth of Kentucky against the Tennessee corporation, for the purpose of having it judicially declared that the corporation had forfeited its right to carry on business in Kentucky and to enjoin it from continuing to do business. That case, and the case of Commonwealth *v.* Jellico Coal Company, reported in the same volume, page 246, were heard and decided at the same time.

It will be seen upon an examination of the statute considered in the two cases above mentioned that it provided that "if any foreign corporation, without the consent of the adverse party, removes to the Federal court, any action pending against it in any court of this State, etc., such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation or any officer, etc., who shall thereafter transact or engage in any business or employment for such corporation in this State, shall be severally guilty of a *misdemeanor*, etc., and be fined for each offense, not less than five hundred nor more than one thousand dollars."

The case of The Commonwealth *v.* The Jellico Coal Company was an action by the Commonwealth to recover from the defendant corporation the sum of one thousand dollars as a fine or penalty.

The court of appeals of Kentucky carefully reviewed the authorities, particularly Doyle *v.* Continental Insurance Company and Barron *v.* Burnside, and followed the ruling of the Supreme Court in the case of Insurance Co. *v.* Morse, 20 Wall., 445, properly holding that section of the Kentucky Statutes unconstitutional and void, because it attempted to abridge the constitutional right of a citizen to remove a controversy to the Federal court.

16 The two Kentucky cases above mentioned were materially different from the case at bar, and the statute there considered materially different from the statute now under consideration. The principles of law of one therefore do not apply to the other.

Section 631, Kentucky Statutes, first regulates the granting of authority to foreign insurance companies to do business in this State, requiring them to file with the insurance commissioner a resolution adopted by the board of directors, consenting to service of process

upon the insurance commissioner of this State, and it regulates the duty of the insurance commissioner respecting such insurance companies, should they remove a cause from a State court to a Federal court, requiring him in such case to revoke the license of such insurance company.

It will be seen from an examination of this act that no penalty or fine is imposed upon an insurance company, but the State legislature, exercising its right to regulate the admission or exclusion of foreign insurance companies, has directed its agent, the insurance commissioner, to execute its wish or purpose.

It has been held by the Supreme Court:

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it, can not be inquired into."

"If the act of the individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it can not be impeached. The acts of a State are subject to still less inquiry, either as to the act itself, or as to the reason for it."

17 It must be admitted that under the authority of Barron *v.* Burnside, the penalty provided in section 572 could not be recovered, and that section was, in the opinion rendered in the case of Commonwealth *v.* Jellico Coal Company, properly held to be unconstitutional. As it was unconstitutional the injunction proceeding (Commonwealth *v.* East Tennessee Coal Company) based upon the same section of the statute and decided at the same time, was properly dismissed. But, the section now under consideration and the rights of the parties arising thereunder have never been passed upon by the court of appeals of Kentucky.

As said above, the case at bar is similar in every respect to the case of Doyle *v.* Continental Insurance Company, differing from it only in the fact that the proceeding was instituted in a State court instead of a Federal court, and if, as held by the Supreme Court of the United States," that as the State had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it," it follows that a State court under like circumstances cannot enjoin. The quotation above is from the review of the Doyle case in the opinion in Barron *v.* Burnside.

It will be remembered that no question of practice or of jurisdiction was raised. In the case above referred to, the proceeding was instituted by a foreign corporation in the Federal court, and the court unquestionably had jurisdiction. The words, therefore, in the opinion "by a court of the United States," is simply surplusage.

The motion for a temporary injunction is overruled and the demurrer to the petition is sustained, with exceptions.

SAM'L B. KIRBY, Judge.

18 At a court held October 29, 1904:

The plaintiff Travelers' Insurance Company of Hartford, Conn., declined to plead further, and the court being advised,

It is now ordered, adjudged and decreed, that the petition be and the same hereby is dismissed and that the defendant recover his costs and for the same may have execution to which the plaintiff excepted and prayed an appeal to the court of appeals which is granted.

STATE OF KENTUCKY, }
County of Jefferson. }

I, W. L. Weller, Jr., clerk of the Jefferson circuit court in and for the county and State aforesaid, do hereby certify that the foregoing transcript contains a true and complete copy of the record according to the truth in the case wherein The Travelers Insurance Company, of Hartford, Conn., is plaintiff and Henry R. Prewitt, insurance commissioner, of the State of Kentucky, is defendant, a cause lately pending in the aforesaid court, chancery branch, second division, No. 38367, as the same appears of record and now on file in my office.

Witness my hand this 31st day of October, 1904.

W. L. WELLER, JR.,
Clerk Jefferson Circuit Court.

19 With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals, in words and figu-es as follows:—

20 In the Court of Appeals of the State of Kentucky, September Term, 1904.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant,
versus
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellee.

Appeal from the Jefferson Circuit Court, Chancery Branch, 2nd Division.

Transcript of Record.

The judgment appealed from was rendered on October 29, 1904, and may be found on page 19 of the record. No summons is to issue.

PIRTLE, TRABUE, DOOLAN & COX,
Counsel of Appellant.

WM. BRO. SMITH, Of Counsel.

21 Be it remembered that on the 2nd day of December 1904 in the court of appeals at the capitol at Frankfort, the following order was entered towit:—

THE TRAVELERS INSURANCE CO. *vs.* PREWITT, Commissioner. } Jefferson.

Came parties by counsel and on motion said cases are ordered docketed, and advanced, and same coming on for hearing were argued by E. F. Trabue for appellant Travelers Insurance Company and by J. H. Hazelrigg for H. R. Prewitt insurance commissioner, and submitted.

And afterwards on the 15th day of December, 1904 at a court of appeals the following judgment was entered towit:—

TRAVELERS INSURANCE COMPANY, Appellant, *vs.* HENRY R. PREWITT, Insurance Company, Appellee. } Appeal from Jefferson Circuit Court, Chancery Branch, 2nd Division.

The court being sufficiently advised it seems to them there is no error, in the judgment herein—

It is therefore considered that said judgment be affirmed which is ordered certified to said court (whole court sitting, Chief Justice Burnam, and Judge Barker dissenting).

It is further considered that the appellee recover of appellant his cost herein expended.

On said day the following opinion was delivered in said case towit:

22 Court of Appeals of Kentucky, December 15th, 1904.

(To be Reported.)

HENRY R. PREWITT, Commissioner, Appellant,
vs.
SECURITY MUTUAL LIFE INS. CO., Appellee.
} Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

THE TRAVELERS INS. CO., Appellant,
vs.
HENRY R. PREWITT, Commissioner, Appellee.
} Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

Opinion of the Court by Judge Hobson.

In the first of the above cases the Security Mutual Life Insurance Company filed its petition in equity alleging that in the year 1900 it began business in Kentucky having complied with the requirements of the statutes of the State applicable to foreign insurance companies, the plaintiff being a corporation organized under the laws of the State of New York; that the commissioner then granted it permission to transact the business of life insurance in this State, and
23 it employed a large number of agents, established a large number of agencies throughout the State, expended large sums of money in advertising its business and acquired a large and profitable business in the State; that in June, 1904, it removed to the circuit court of the United States for the eastern district of Kentucky without the consent of the other party a suit brought against it in one of the circuit courts of the State, and that on September 29, 1904, the defendant Prewitt, as insurance commissioner, revoked its authority to do business in the State for the sole reason that it had removed the suit referred to to the circuit court of the United States and refused, and still refuses, to set aside the revocation. It prayed an injunction requiring the commissioner to annul the revocation of its license and to continue its authority to transact the business of life insurance in the State. The defendant demurred to the petition, his demurrer was overruled, and he declining to plead further, a judgment was entered as prayed in the petition.

24 In the other case the petition is very similar, except that it is there averred that the commissioner has not yet revoked the plaintiff's license, but that he threatens to do so, and unless enjoined by the court will revoke it, to the plaintiff's irreparable injury, it being a foreign corporation created under the laws of the State of Connecticut. The defendant demurred to the petition; his demurrer was sustained, and the plaintiff declining to plead furthe,

its petition was dismissed. Both the appeals raise the same questions, and will be considered together.

By section 633, Ky. Stat., licenses to agents of foreign companies must be renewed annually, and any person acting as the agent of such a company without procuring a license, or after the license has expired, or has been suspended or revoked, shall be guilty of a misdemeanor, and fined not less than $50.00 nor more that $100.00 for each offense. By section 634 every foreign insurance company before transacting any business in this State must return to the commissioner a copy of its charter or organic law, and the commissioner upon being satisfied that the company has complied with the
25 laws of the State and is possessed with the legal reserve, shall furnish to such agents as the company directs a license to transact business as agents for the company, under the seal of the insurance department. By section 657, foreign life insurance companies in addition must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, &c. By section 694, insurance companies other than life not incorporated under the laws of this State, upon complying with the provisions of the statute, may be authorized by the commissioner to transact business in the State. By section 761 the fees to be charged by the commissioner are regulated. Section 631, Ky. Stat., is in these words:

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said com-
26 pany; and if process is served upon the commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State; and to publish such revocation in some newspaper of general circulation published in the State."

The validity of the latter clause of the section is the only question to be determined upon the appeal. It is insisted that it is in conflict with the Constitution of the United States. Three decisions of the United States Supreme Court are relied on. In Home Insurance Company *v.* Morse, 20 Wall., 445, the statute of the State required the foreign insurance company to sign an agreement not to remove any of its cases to the Federal courts. The company signed the agreement and afterwards filed a petition seeking the removal of a

suit brought against it to the Federal court. The State court
27 refused to remove the case, but on appeal to the United States Supreme Court the judgment of the State court was reversed and it was held that the agreement in advance not to exercise a right guaranteed by the Constitution did not prevent the defendant from removing the case to the Federal court. The opinion was written by Judge Hunt, and goes no further than the question actually before the court.

The next case relied on is Doyle *v.* Continental Insurance Company, 4 Otto, 535, the opinion being also written by Judge Hunt. In that case there was a State statute corresponding to section 631 above quoted, and the State officer under it was about to cancel the license of the insurance company. The plaintiff made in substance the same allegations as are made in the cases before us, and prayed an injunction as in these cases. The Supreme Court reversing the court below, dismissed the bill. After distinguishing the case from the Morse case, the court said:

"The cases of Bank *v.* Earle (13 Pet., 519), Ducat *v.* Chicago
28 (10 Wall., 410), Paul *v.* Va. (8 Wall., 168), and Insurance Company *v.* French (18 How., 404), establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field (Curtis) in the case last named.

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. (Rector *v.* Philadelphia, 24 How., 300; People *v.* Roper, 35 N. Y., 629; People *v.* Commissioners, 47 N. Y., 501.) The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. (Humphrey *v.* Pegues, 16 Wall., 244; Tomlinson *v.* Jessup, 15 Wall., 454.)

"License to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens and its business belongs to the State.

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus, the pleading before us alleges that the permis-
29 sion of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself, or as to the reason for it.

The State of Wisconsin (except so far as its connection with the Constitution and laws of the United States alters its position) is a sovereign State, possessing all the powers of the most absolute government in the world.

"The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is un impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

"In all cases where the litigation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal."

30 After discussing certain previous decisions, the court added:

"It is said that we thus indirectly sanction what we condemn when presented directly, to-wit: that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

It is conceded by counsel that if this case is still authority, these actions must fail. But it is insisted that in Barron *v.* Burn-

31 side, 121 U. S., 186, this case was, in effect, overruled. In Barron *v.* Burnside, there was a State statute requiring every foreign corporation to have a license before engaging in business in the State. The license, by the terms of the statute, was not to be issued, except upon the application of the company by a resolution of the board of directors or stock holders authorizing it, and containing a stipulation that the permit should be subject to each of the provisions of the act, one of which was that the permit should be void if the corporation removed a case to the Federal courts. Barron was arrested under the statute for doing business for a foreign corporation without complying with the statute and obtained a writ of *habeas corpus*, which was sustained by the United States

Supreme Court. The court, after quoting the statute, and discussing it at some length, said:

"This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit; and this request or application is to contain the stipulation above mentioned. These various things are not separable."

32 Then after some further discussion of the statute, the court concludes with these words:

"In view of these considerations, the case falls directly within the decision of this court in Home Insurance Company *v.* Morse."

It then proceeds, after showing what was decided in the Morse case, to discuss the Doyle case in these words:

"The case of Doyle *v.* Continental Insurance Company, 94 U. S. 535, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in Home Insurance Company *v.* Morse, and was satisfied with it. In referring to the second conclusion in Insurance Company *v.* Morse, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said, in Doyle *v.* Continental Insurance Company, that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license

33 to do business in the State. Afterwards, it removed into the Federal court a suit brought against it in a State court of Wisconsin. The State authorities threatening to revoke the license the company filed a bill in the circuit court of the United States praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree, and dismissed the bill. The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Company *v.* Morse (*supra*), must be regarded as not in judgment."

We do not understand this to overrule the Doyle case, for certainly if the State cannot withdraw the license it has once granted any court of competent jurisdiction may so decide. If the State statute withdrawing the license was unconstitutional and void, the Supreme Court of the United States had the same power to

34 declare the statute in that case unconstitutional as it had to declare the statute unconstitutional in Barron *v.* Burnside.

Our statute is not liable to the objections made to the statute in either the Morse case or the Barron case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the State for the protection of its citizens against unsafe insurance companies should require them before doing business in the State to obtain a license from the insurance commissioner, and to furnish him such evidence of their solvency as will protect insurers in this State, before he is authorized to grant them a license. The license which the State grants is purely a matter of grace, and like any other license may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for when he takes it he takes
35 it subject to revocation. He cannot question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State, with or without reason. If I have license to cross my neighbor's lot and he revokes it because I brought a suit against his son, I cannot enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for his revoking the license he had given me; for he had an absolute right to revoke the license and the fact that he did it out spite or for a bad reason is immaterial. The State, by her statutes above referred to, in effect, says to the foreign insurance companies, "I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If after you come, you refuse to so stand, I will withdraw my license." The reason for the statute is not distrust of the Federal courts, but the
36 practical denial of justice that results in a sparsely settled State like ours, if the case must be tried one or two hundred miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the vicinage; the State simply says to the foreign insurance companies, "I will withdraw my license if you insist on privileges not enjoyed by home companies." If the State on the day before these suits were filed by legislative act had withdrawn all licenses to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States circuit court, could these plaintiffs have complained? If not, how are they affected by the fact that the State acts by an executive officer, and not by a special statute? Certainly they cannot complain that the license of certain other companies was not revoked.

The case of Commonwealth *v.* East Tennessee Coal Company, 97 Ky., 238, did not involve the revocation of a license
36½ granted by the State, but was in effect similar to Barron *v.* Burnside, above cited, being a proceeding to impose a fine on

the defendant after it removed a case from the State courts. The naked question presented here is, may the State, without cause, revoke a license it has once granted; for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound; unless the whole doctrine that the State may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a State may at will prohibit foreign corporations from doing business in the State (Hooper v. California, 155 U. S., 650), and yet that it may not at will withdraw a license which it has once granted to such corporations.

It seems to us that the Boyle case rests on sound principles, and that the Barron case in no wise conflicts with it; for that case is by the court expressly put upon the ground that the statute there, when
properly construed, fell within the rule laid down in the
37 Morse case. (6 Thompson on Corporations, sections 7466-67; 13 Am. & Eng. Ency. of Law, page 867; People v. Pavey, 151 Ill., 101.)

The judgment in the first case is therefore reversed and cause remanded to lower court with instructions to dismiss petition.

The judgment in the second case is affirmed.
Whole court sitting.

Chief Justice Burnam & Judge Barker dissenting.

N. B. Hays, att'y gen'l, J. H. Hazelrigg, for ins. com'r.

Wm. Marshall Bullitt, F. W. Jenkins, for Security Mut. Life Ins. Co.

Pirtle, Trabue, Doolan & Cox, Wm. Bro. Smith, for Travelers Insurance Company.

[Stamped:] W. G. Baxter, official copyist court of appeals Kentucky.

38 And afterwards on the 19th day of January 1905, at a court of appeals at the capitol at Frankfort, the following order was entered to wit:—

THE TRAVELERS' INS. CO.
vs.
PREWITT, Commissioner. } Jefferson.

Judge Barker delivered a dissenting opinion herein.

39 The said dissenting opinion being in words and figures as follows:

40 Court of Appeals of Kentucky, January 19, 1905.

HENRY R. PREWITT, Commissioner, Appellant,
vs.
SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee.

THE TRAVELERS' INSURANCE COMPANY, Appellant,
vs.
HENRY R. PREWITT, Commissioner, Appellee.

Dissenting Opinion by Judge Barker.

Believing that the conclusion reached by the majority of the court in these cases cannot be justified either by reason or upon authority, I feel it my duty to present my views in a dissenting opinion. I do this with great modesty, and with great reluctance: the first from solicitude lest I fail to do justice to the importance of the subject, and the second from my disinclination to differ from the opinions of those whose attainments I hold in so high esteem.

41 The question presented by these records is whether a State may enact a valid law, which shall present to a foreign corporation the alternative either of surrendering its right, under the provisions of the Constitution and laws of the United States, to remove to the Federal court an action instituted against it by a citizen in the State court, or of not being permitted to do business in the State. The proper solution of this question is essential to the orderly adjustment of the conflicting spheres of our dual system of jurisprudence—national and State.

When our complex form of government was established, the national Constitution and the laws enacted in pursuance thereto, were made the supreme law of the land (U. S. Constitution, art. 6:) and it must necessarily follow, as a logical and legal sequence, that, whenever a State law comes in conflict with a national law, the former must give way—it is void. The statutes of the United States, in pursuance of a settled national policy of affording to citizens of each State the means of escaping the dangers of local prejudice in favor of home litigants, prescribe the conditions and terms

42 under which such actions may be removed to the Federal courts. This is done in the interest of fair and impartial trials, or, in other words, in the interest of justice.

The laws of our Commonwealth bearing upon the question under investigation are divided into two branches, although the intent of each is the same; the divergence being merely in the particular manner of enforcing the same principle against different classes of corporations. Sections 572 and 573 of the Kentucky statutes apply to all foreign corporations doing business in the State, except insurance companies, and are as follows:

SECTION 572. "If any foreign corporation shall, without the con-

sent of the adverse party, remove to a Federal court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employé thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor, and, upon indictment and conviction in the circuit court of any county in which such corporation, or any officer, agent or employé thereof transacts or engages in any business, be fined for each offense
43 not less than five hundred nor more than one thousand dollars."

SECTION 573. "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The statute applicable to foreign insurance corporations, is to be found in sections 631 and 633 of the Kentucky statutes, and
44 is as follows:

SECTION 631. "Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding

to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

SECTION 633. "Licenses to agents of foreign companies must be renewed annually in the same manner as original licenses, upon a finding by the commissioner that the company represented by the agent has fully complied with the law, and maintains its required capitol or reserve; and whoever solicits and receives application for insurance on behalf of any insurance company, or transmits for any person other than himself an application for insurance, or a policy of insurance to or from such company, or advertises that he
45 will receive or transmit the same, or who shall in any manner, directly or indirectly, aid or assist in transacting the insurance business of any insurance company, shall be held to be an agent of such company within the meaning of this article, anything in the policy or application to the contrary notwithstanding; and any person acting as the agent of any company within the meaning of this section, without first procuring and having a license from the commissioner to act as such agent, or, after such license has expired, been suspended or revoked, or who shall procure any premium or obligation therefor by fraudulent representations, shall be deemed and held to be guilty of a misdemeanor, and, upon conviction for such offense, shall be fined not less than fifty nor more than one hundred dollars for each offense."

The question involved here was presented for adjudication in this State for the first time in Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238, and Commonwealth *v.* Jellico Coal Co., *id.* 246. These cases arose under section 572 of the Kentucky statutes, the two corporations, as their names import, being coal companies. The opinions in both were delivered by the court through Judge Eastin, and contain a learned and thorough discussion of the question at bar. In both, section 572, which, as said before, applies to foreign corporations (except insurance) doing busi-
ness in the State, was held to be void, because in
46 confravention of the Constitution and the laws of the United States. These cases are both practically overruled by the opinion of the majority, although this has not been done in express language; the court, as it seems to me, unsuccessfully seeking to distinguish them from the cases at bar, and, in so doing, inadvertently, of course, misstating the question involved in them. The following is the language of the opinion with reference to the case containing the reasoning on the constitutional question: "The case of Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238, did not involve the revocation of a license granted by the State, but was in effect similar to Barron *v.* Burnside, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the State

court." Judge Eastin commences his opinion with the following language: "This appeal involves the constitutionality of section 572 of the Kentucky statutes which is in these words, to wit:" * * * Then, after citing section 572, he said:

"Under this provision of the statutes, this action was brought by appellant in the Whitley circuit court for the purpose of
47 having it judicially declared that appellee had forfeited its right to carry on business in Kentucky, and of enjoining it from doing so. In the petition, it is alleged that appellee is a foreign corporation, created by the laws of the State of Tennessee, but engaged for several years past in carrying on business in Whitley county in this State, and that on May 14, 1894, it had, by proper proceedings, procured the removal from the Whitley circuit court, of an action therein pending against it, to the Federal court sitting at Frankfort, Ky., on the alleged ground that said suit involved a controversy between citizens of different States, and that this was done without the consent of the adverse party to said action. It is further alleged that, by this action, appellee has forfeited its right to carry on business in this State, but that, notwithstanding this fact, it is still engaged in carrying on its business in Whitley county, Kentucky, and the court below is asked to decree the existence of the alleged forfeiture and to enjoin appellee from further continuing its said business in Kentucky."

So that the court are mistaken in supposing that the case
48 explained simply involved the imposition of a fine. It was nothing more or less than a proceeding to revoke the license or right to do business in Kentucky of a foreign corporation, for the sole reason that it had exercised its privilege of removing an action, instituted against it by a citizen of this State, to the Federal court. In principle the questions involved there and here are identical. With this question before it, the court there held that section 572 was unconstitutional, after a review of all the Federal decisions on the subject. The opinion concludes in these words:

"From this review of the decisions of the Supreme Court of the United States, it would seem that there is no longer any question as to the invalidity of legislation such as this act we are now considering. Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the Constitution and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would clearly embrace all foreign corporations; and any legislation on part of the State, by which it is proposed or designed to take away that privilege,
49 even under the power of the State to fix the terms upon which the corporation may enter that State, for the purpose of doing business, is unconstitutional and void.

"In accordance with these views we adjudge that section 572 of the Kentucky statutes is unconstitutional, and that the demurrer of appellee to the petition filed against it by appellant was properly sustained."

The case of Commonwealth *v.* Jellico Coal Company did involve the right to fine a foreign corporation for removing an action instituted against it by a citizen of the State to the Federal court, and the right to impose this fine was denied upon a simple question of procedure under the statute; however, the court did not rest here, but, after deciding the case adversely to the Commonwealth on the first ground, said: "* * * but, in addition to this, and for the reasons fully set forth in the opinion this day delivered in the case of Commonwealth *v.* East Tennessee Coal Co., *ante*, p. 246, with which this appeal was heard, it is the opinion of this court that the section of the statute above referred to is in conflict with the Constitution and laws of the United States, and therefore void."

50 So that it is plain that this court, as then constituted, were of opinion that section 572 was unconstitutional, and, under its provisions, neither a fine could be imposed for a violation of its terms, nor the right to do business by a foreign corporation prevented in a direct proceeding had for that purpose.

These cases, and especially the first one, so far as the principle involved is concerned, are identical with that in the cases at bar. Of course, I recognize the inutility of pointing out a conflict between older and later opinions of the same court on the same question; the last is always the law. But I deeply regret that an opinion showing such painstaking labor and learning, as does that in Commonwealth *v.* East Tennessee Coal Company, should receive no better fate at the hands of the court, as at present constituted, than to be silently ignored, or, worse still, should only have been thought worthy of a casual line, which wholly misstates the question involved.

But there are cases which cannot be so lightly thrust aside, being the utterances of the Supreme Court of the United States, which is the final expositor of all questions arising under the Constitution and the laws of the United States.

51 The question in hand, so far as I am advised, was adjudicated by the Supreme Court of the United States for the first time in Insurance Co. *v.* Morse, 87 U. S. (20 Wall.) 445. This case went up from the State of Wisconsin under a statute, the pertinent part of which is as follows:

"It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; any such company desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office

of the secretary of state a written instrument, duly signed an sealed, certifying such appointment, which shall continue until a other attorney be substi-ted."

The question arose in this way: The Home Insurance Compan of New York having been sued in Wisconsin by a citizen
52 that State, undertook to remove the action under the Fe eral statute to the Federal court. This was resisted becaus the company had agreed, in compliance with the statute abov quoted, not to remove such actions to the Federal courts, and th fact being established, the State court refused to permit the remova and entered judgment on final hearing against the company. Th Supreme Court of the United States, on writ of error, reversed th supreme court of Wisconsin, and returned the case with directio to grant the removal in accordance with the prayer of the petitio This was done on two grounds; first, that the agreement was voi at common law, and, second, it was void because it was in contr vention of the National Constitution, and statutes passed pursua thereto, permitting the removal in question. The court said (pag 458):

"We are not able to discover in this case any countenance for th statute of Wisconsin which we are considering.

"On this branch of the case the conclusion is this:

"1st. The Constitution of the United States secures to citizens another State than that in which suit is brought an absolute rig to remove their cases into the Federal court, upon compliance wit the terms of the act of 1789.

53 "2nd. The statute of Wisconsin is an obstruction to th right, and is repugnant to the Constitution of the Unit States and the laws in pursuance thereof, and is illegal and void.

"3rd. The agreement of the insurance company derived no su port from an unconstitutional statute and is void, as it would be ha no such statute been passed."

The case of Doyle *v.* Continental Insurance Company afterwar went up from the supreme court of Wisconsin to the Supreme Cou of the United States on a different phase of the same statute. that case, the insurance company removed the cause, and the Sta authorities undertook to revoke the license to do business in th State for this violation of the statute. The company instituted suit in equity for an injunction restraining the secretary of sta from this alleged wrongful act. A temporary restraining order w entered, and, upon final hearing, was made perpetual. On appe the Supreme Court held that the foreign insurance company w without remedy under the circumstances, and that the State cou revoke the license even under an unconstitutional la
54 There can be no doubt that the opinion in this case ful sustains that of the majority in the case at bar, and, if it st expresses the law, my brethren are correct in the conclusion th have reached in the cases under consideration. But, afterwards, t case of Barron *v.* Burnside, 121 U. S. 186, came on for adjudicatio

and involved a still different phase of a similar statute. This case arose in Iowa, under a statute not differing in principle from any of the statutes hereinbefore stated or discussed. The law denounced a fine against any foreign corporation doing business in Iowa without a permit or license; sections 3 and 4 being as follows:

"SEC. 3. Any foreign corporation sued or impleaded in any of the courts of this State upon any contract made or executed in this State or to be performed in this State or for any act or omission, public or private, arising, originating or happening in the State, who shall remove any such cause from such State court into any of the Federal courts held or sitting in this State, for the cause that such corporation is a non-resident of this State or a resident of another State than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State; such forfeiture to be determined from the record of removal, and to date from the date of filing of the
55 application on which such removal is affected, and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner."

"SEC. 4. Any foreign corporation that shall carry on its business and transact the same on and after September 1, 1886, in the State of Iowa by its officers, agents, or otherwise, without having complied with this statute, and taken out, and having a valid permit shall forfeit and pay to the State for each and every day in which such business is transacted and carried on the sum of one hundred dollars ($100), to be recovered by suit in any court having jurisdiction. And any agent, officer or employé who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor and for each offense shall be fined, not to exceed one hundred dollars ($100), or imprisoned in the county jail not to exceed thirty days and pay all costs of prosecution."

The Chicago and Northwestern Railroad Company was an Illinois corporation doing business in Iowa without the permit or license required by the statute. One of its engineers was arrested and fined for carrying on the business of the corporation when it had no permit to do business in the State. When this case came to the Supreme Court, both of its former adjudications on this sub-
56 ject were reviewed and the conclusion reached that the whole statute was void, because of the unconstitutionality of that part which undertook to prohibit foreign corporations from removing causes against them to the Federal court. On the subject of Doyle *v.* Continental Insurance Company, after thoroughly discussing it, the court said (page 199): "The point of the decision seems to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from

withdrawing it. All that there is in the case beyond this, and all tha
is said in the opinion which appears to be in conflict with the adjud
cation in Insurance Co. *v.* Morse, must be regarded as not in judg
ment." I differ from the majority in construing this language of th
opinion. It seems to me that it was meant to overrule the opinio
then under review. Any other conclusion would make it meanin
less. There is no doubt but that the Iowa statute applied to the fo
eign insurance company involved in the litigation. Mr. Justic
Blatchford opens his opinion with the following sentence: "Th
statute manifestly applies to the Northwestern Railway Compan
as an Illinois corporation;" so that if the statute wa
57 valid, the proceeding against the offending engineer was als
valid, as there was no question in the opinion as to the com
mission of the acts which contravened the statute. The court con
cludes its review of the two cases in the following language:

"In both of the cases referred to, the foreign corporation ha
made the agreement not to remove into the Federal court suits to b
brought against it in the State court. In the present case no suc
agreement has been made, but the locomotive engineer is arreste
for acting as such in the employment of the corporation, because
has refused to stipulate that it will not remove into the Federa
court suits brought against it in the State court, as a condition
obtaining a permit, and consequently has not obtained such permi
Its right, equally with any individual citizen, to remove into the Fe
eral court, under the laws of the United States, such suits as a
mentioned in the third section of the Iowa statute, is too firmly e
tablished by the decisions of this court to be questioned at this day
and the State of Iowa might as well pass a statute to depriv
58 an individual citizen of another State of his right to remov
such suits.

"As the Iowa statute made the right to a permit dependen
upon the surrender by the foreign corporation of a privilege secure
to it by the Constitution and laws of the United States, the statut
requiring the permit must be held to be void."

The inherent infirmity of the majority opinion lies in the effe
it gives to an unconstitutional statute. The Supreme Court, in th
case of Norton *v.* Shelby County, 118 U. S. Rep., 442, on th
subject says: "An unconstitutional act is not a law; it confers n
right; it imposes no duty; it affords no protection; it create
no office; it is, in legal contemplation, as inoperative as thoug
it had never been passed." In Cooley's Constitutional Limit
tions, (page 188) it is said: "When a statute is adjudged t
be unconstitutional, it is as if it has never been. Rights ca
not be built up under it; contracts which depend upon it fo
their consideration are void; it constitutes a protection to n
one who has acted under it, and no one can be punished for havin
refused obedience to it before the decision was made." If th
59 be the law, then so much of the statute under considerati
as is admitted to be unconstitutional is as if it had never be

enacted by the legislature; where, then, is the warrant of the insurance commissioner for the revocation of the licenses in these cases? It is no answer to say that, if a State may refuse to permit a foreign corporation to do business in the State, or to arbitrarily revoke its license so to do, (or, in other words, revoke it for no reason) that, therefore, it may do this for an invalid reason, or under the authority of an unconstitutional statute. A State can only speak through its laws, and, if the law is invalid, then the State has not spoken at all. The Commonwealth has not undertaken to prevent foreign corporations from doing business in the State, or to revoke their license so to do "for no reason," or arbitrarily; it has said to its insurance commissioner that he must grant foreign insurance companies license to transact business in this State when they comply with certain requirements, and that he must revoke this license if they remove to the Federal court a suit against them by a citizen of the State. Now, this latter part of the statute is conceded to be void,
being in contravention of the laws of the United States;
60 therefore, in reading the statute, it must be omitted, and
when this is done, we find no warrant for the action of the commissioner. To illustrate this, take a pen and erase from the face of the statute those parts which are admitted to be invalid, and then it will present its legal attitude towards foreign corporations; and nothing will be left which authorizes the revocation of the license. Of course, this view is predicated upon the theory that the statute is separable, and that the valid part may be segregated from the invalid. If this cannot be done, then the whole statute is void, and there is no law whatever on the subject, and, as a consequence, still less authority (if that were possible) for the revocation.

No practical difference can be pointed out between the statutes of Wisconsin, Iowa, or Kentucky, on the subject under discussion. They were all enacted for the same purpose, and even the verb-age is remarkable in its similarity. In the cases at bar, the corporations bear the same attitude toward the laws of the State of Kentucky as did the corporation toward the laws of the State of Iowa,
and the analogy is complete when the license is revoked by
61 the commissioner; for a corporation whose license is revoked
is in precisely the same relation towards the law as one which never had a license. If this be so (and it seems axiomatic), of what avail is the conclusion of the majority, if it results that the revocation of the license is a mere *brutem fulmen*, and that the State is unable to invoke the vindicatory part of the statute because of its invalidity? Is so fine a distinction worth the drawing? It seems to me this must be answered in the negative. And yet this is the precise result of the revocation of the insurance commissioner in these cases, if the opinion in Barron *v.* Burnside expresses the law.

The opinion of the majority, as said heretofore, is not only contrary to authority, but also to reason. The policy of the national law under discussion is to place, as far as possible, a citizen of one

State engaged in litigation with a citizen of another State, on a plane of equality before the law; in other words, to make it possible that the stranger may defend his property or rights free from the bias of local prejudice or passion. No disinterested mind will deny that this is a just policy. The question then is whether
62 this beneficent policy in the interest of a fair and impartial trial to the foreign citizen may be nullified by a statute enacted for the selfish purpose of giving the citizen the advantage of a trial close to his home (to put the most favorable construction on it) without any regard to the still greater distance of the stranger from his home, and his inconvenience on that score, or of the danger of his suffering from local prejudice or passion in a suit with the citizen. The State statute considers only the convenience of the citizen as measured by the additional distance to the place of trial after removal of the case to the Federal court, and ignores the danger to the foreigner of a miscarriage of justice, on the merits of the controversy, arising from local prejudice or passion in the State tribunal. The existence of such a statute, in itself affords a justification of the national policy, as expressed in the removal statutes, if such justification were needed.

It may not be altogether impertinent to the subject in hand to say, in conclusion, that it would be well to remember that it is a narrow and provincial view, to regard these national laws as harsh and severe edicts imposed by a foreign suzerain, instead of
63 benignant laws imposed by ourselves in the interest of a broad and national justice; and that in their practical operation, many more of our own citizens are benefitted by them in their litigation in other States than are inconvenienced by them in favor of citizens of foreign States litigating in our Commonwealth.

For the foregoing reasons, I dissent from the opinion of the majority of the court in these cases.

Hazelrigg, Chenault & Hazelrigg, N. B. Hays, Henry R. Prewitt, for Insurance Co.

Wm. Marshall Bullitt, for Security Mut. Life Insurance Co.

Pirtle, Trabue, Doolan & Cox, Wm. Bro. Smith, for Travelers Ins. Co.

64 Be it remembered that afterwards on the 13 day of February 1905, there was filed in the office of the clerk of the court of appeals also a petition for writ of error from the United States Supreme Court to the court of appeals of the Commonwealth of Kentucky, which petition is hereto attached, and afterwards there was filed in the office of the clerk of the court of appeals an assignment of errors, and which is hereto attached and both are as follows:

65 Court of Appeals of Kentucky.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff in Error,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant in Error.

Petition for Writ of Error and Assignment of Errors.

The above named The Travelers Insurance Company of Hartford, Connecticut conceiving itself aggrieved by the decision made and judgment rendered by the court of appeals of Kentucky in the cause of the above named plaintiff in error against the above named defendant in error in said court at its October term A. D. 1904, to-wit, on the 15th day of December, A. D. 1904, said court being the highest court of the State of Kentucky and the court of last resort for the hearing and determination of said cause, in which cause was drawn in question the validity of a statute of the State of Kentucky, to-wit, section 631 Kentucky Statutes, upon the ground that it was repugnant to the Constitution of the United States under which Constitution plaintiff in error claimed immunity and privilege of exemption from the operation or effect of said statute of Kentucky and the decision of said State court was in favor of the validity of said statute and against the right specially set up and claimed under the Constitution of the United States by said plaintiff in error, the said right specially claimed and set up being the right of plaintiff in error to remove to the United States circuit court for the western district of Kentucky a certain action instituted against it in the Jefferson circuit court, Jefferson county, Kentucky by
66 Abram Frankel and others for the recovery of twenty-five thousand dollars ($25,000.00), the said right being denied as aforesaid by said State court by virtue of the said State statutes;

Presents herewith its assignment of errors and prays for a writ of error to issue out of the Supreme Court of the United States to said court of appeals of Kentucky to the end that the record in said matter may be removed to the said Supreme Court of the United States, and the errors complained of by plaintiff in error may be examined and corrected and the judgment aforesaid of said court of appeals of Kentucky be reviewed and reversed.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Court of Appeals of Kentucky.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, Connecticut,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.

Assignment of Errors.

Plaintiff in error, The Travelers Insurance Company of Hartford, Connecticut feeling itself aggrieved by the findings and judgment of the court of appeals of Kentucky in the above entitled cause, comes by its attorneys and assigns errors thereto as follows, to-wit:

I.

The court of appeals of Kentucky erred in holding and adjudging that the statute passed by the General Assembly of the Commonwealth of Kentucky, constituting section 631 of the Kentucky Statutes was not in conflict with article III, section 2 of the Constitution of the United States in preventing jurisdiction by the Federal courts of controversies between citizens of different States. Plaintiff in error in the above entitled cause especially set up and
67 claimed and now avers that said section 631 was and has always been in conflict with, and offended the provision of said Constitution of the United States and the act of Congress passed pursuant thereto providing for jurisdiction in the circuit courts of the United States of actions or suits between citizens of different States, and for the right of removal on behalf of non residents to said circuit courts of the United States of actions between citizens of different States wherein the amount in dispute exceeds exclusive of interest and costs the sum or value of two thousand dollars ($2,000).

II.

The court of appeals of Kentucky erred in deciding that the threatened cancellation by the defendant in error of the authority of plaintiff in error to transact business in Kentucky because of the removal by said plaintiff in error to said circuit court of the United States of the action instituted against it by Abram Frankel and others, would not amount to nor constitute a denial to plaintiff in error of a right, privilege or immunity guaranteed or afforded to it by said Constitution of the United States and the acts of Congress passed in pursuance thereof.

III.

The court of appeals of Kentucky erred in deciding that because said section 631 of the Kentucky Statutes did not require of a foreign insurance company a stipulation not to remove cases to the United States courts and did not make its authority to transact business in

Kentucky conditioned upon its entering into such stipulation, therefore such statute did not deny and that the threatened action of defendant in error in cancelling its license would not deny to plaintiff in error a right or privilege guaranteed to it by the Constitu-
68 tion of the United States and the acts of Congress made in pursuance thereof.

IV.

The court of appeals of Kentucky erred in deciding that inasmuch as said section 631 Kentucky Statutes aforesaid did not forbid the removal of any case to the United States courts nor the institution of any action or suit in said courts, but only required the defendant in error to cancel the authority of plaintiff in error in case of the latter's removal of any action or suit to the said United States courts, or institution of any action or suit in such courts that therefore said statute did not conflict with the aforesaid provisions of the Constitution of the United States and the act of Congress made in pursuance thereof and did not deny to plaintiff in error any right, privilege or immunity guaranteed or afforded to it by the said Constitution of the United States or the act of Congress passed in pursuance thereof.

V.

That the court of appeals of Kentucky erred in deciding that section 631 aforesaid of the Kentucky Statutes was not in conflict with the Constitution of the United States, and especially not in conflict with the aforesaid article III, section 2 thereof, nor with the act of Congress passed in pursuance thereof.

VI.

The court of appeals of Kentucky erred in deciding that section 631 aforesaid of the Kentucky Statutes was not in conflict with the Constitution of the United States inasmuch as it tended to interfere with the exercise of the plaintiff in error of a right under said Constitution to remove controversies between it and citizens of the
69 State of Kentucky to the United States courts.

VII.

That the court of appeals of Kentucky erred in deciding that section 631 of the Kentucky Statutes aforesaid was not in conflict with, and did not offend the Constitution of the United States in being designed, although designed to prevent and having the effect to prevent the exercise by plaintiff in error of a privilege guaranteed to it by the Constitution of the United States to remove to the United States courts actions and suits between it and citizens of the State of Kentucky.

VIII.

The court of appeals of Kentucky erred in holding that section 631 aforesaid, Kentucky Statutes, did not offend the Constitution of the United States in making, although it made, the authority of a foreign insurance company to transact business in Kentucky dependent upon its forbearing to exercise the right guaranteed to it by the Constitution of the United States and act of Congress passed in pursuance thereof to remove to the United States courts actions or suits within the jurisdiction of such courts instituted against such companies by citizens of Kentucky, or to institute in such courts suits within their jurisdiction against citizens of Kentucky.

IX.

The court of appeals of Kentucky erred in holding that the plaintiff in error was not entitled to the injunction which it prayed, and in not holding that section 631 aforesaid of the Kentucky Statutes was illegal and void because in conflict with the Constitution of the United States, and because it denied to plaintiff in
70 error the right, privilege and immunity conferred upon it by the said Constitution.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed —— —.
J. P. HOBSON.

70½ [Endorsed:] Filed Feb. 13 1905 J. Morgan Chinn, C. Ct.

71 And afterwards there was filed in the office of the clerk of the court of appeals, order allowing writ of error and approving bond, which order is hereto attached and is as follows:

72 Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of court of appeals of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court of appeals of Kentucky, being the highest court of law or equity of the said State of Kentucky in which a decision could be had in the said suit between The Travelers Insurance Company, of Hartford, Connecticut, plaintiff, and Henry R. Prewitt, insurance commissioner of the State of Kentucky, defendant, wherein was drawn in question the validity of a statute of the State of Kentucky on the ground of its being repugnant to the Constitution of the United States and act of Congress passed in pursuance thereof and the decision was in favor of such

State statute, and against the right, privilege and immunity specially set up and claimed under the Constitution of the United States by the said The Travelers Insurance Company of Hartford, Connecticut, a manifest error hath happened to the great damage of the said The Travelers Insurance Company of Hartford, Connecticut, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of March, A. D. 1905 in the said Supreme Court, to be
72½ then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13th day of February in the year of our Lord, one thousand nine hundred and five.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court,
Eastern District of Kentucky.

Allowed by
J. P. HOBSON.
Chief Justice of the Court of Appeals of Kentucky.

72½ [Endorsed:] Filed Feb. 13 1905. J. Morgan Chinn, C. et.

73 And afterwards there was filed in the office of the clerk of the court of appeals a supersedeas bond and which is in words and figures as follows:

74 Court of Appeals of Kentucky.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, Connecticut, Plaintiff in Error,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant in Error.
} Bond.

Know all men by these presents: That the Travelers Insurance Company of Hartford, Connecticut, principal, and Henry W. Kennedy, surety, are held and firmly bound unto the above named Henry R. Prewitt, insurance commissioner of the State of Kentucky, in the sum of five hundred dollars ($500.00) to be paid to the ob-

ligee herein, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated the 13 day of February, A. D. 1905.

[SEAL.] THE TRAVELERS INSURANCE COMPANY,
By H. B. KNOWLTON, Manager.
[SEAL.] H. W. KENNEDY.

75 Whereas, the above named The Travelers Insurance Company of Hartford, Connecticut, has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered on the 15th day of December, A. D. 1904, by the court of appeals of Kentucky in the case of the said The Travelers Insurance Company of Hartford Connecticut, against the said Henry R. Prewitt, insurance commissioner of the State of Kentucky:

Now, therefore, the condition of this obligation is such that if the above named The Travelers Insurance Company of Hartford, Connecticut, shall prosecute its said writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed in the presence of us this the 11th day of February, A. D. 1905.

W. E. BRYAN.
HARRY LANCASTER.

Approved by me this the 13th day of February, 1905.

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

76 And afterwards there was filed in the office of the clerk of the court of appeals, a citation with proof of service endorsed thereon, and which is hereto attached and is as follows:—

77 UNITED STATES OF AMERICA, *ss*:

The President of the United States to Henry R. Prewitt, insurance commissioner of the State of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kentucky, wherein The Travelers Insurance Company of Hartford, Connecticut is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected

and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 13th day of February, A. D. 1905, and of the Independence of the United States the one hundred and twenty-ninth.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
J. MORGAN CHINN, Clerk.

Copy of the within citation received this the 13th day of February, A. D. 1905

J. H. HAZELRIGG,
Counsel for Defendant in Error.

[Endorsed:] Filed Feb. 13 1905. J. Morgan Chinn, C. ct.

78 COMMONWEALTH OF KENTUCKY, }
The Court of Appeals. }

I J. Morgan Chinn clerk of the court of appeals of the Commonwealth of Kentucky, do hereby certify that the foregoing pages contain a full true and complete copy and transcript of the record and proceedings had in the court of appeals of the Commonwealth of Kentucky including the opinion of said court in the action of The Travelers Ins. Co., appellant, *vs.* Henry R. Prewitt, appellee, as full and complete as the same remain on file and of record in my office, which I herewith transmit in pursuance of the command of the writ of error thereto attached.

I also further certify that with said transcript is attached the original petition for writ of error, the original assignment of errors, the original order allowing the writ of error and approving the bond, and a copy of the bond.

I also further certify that *that* the original citation with the proof of service, endorsed thereon, and the original writ of error are hereto attached, and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court. Done at Frankfort at the capitol at Frankfort, on this the 15th day of February, A. D. 1905.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

Endorsed on cover: File No. 19,639. Kentucky court of appeals. Term No. 539. The Travelers Insurance Company of Hartford, Connecticut, plaintiff in error, *vs.* Henry R. Prewitt, insurance commissioner of the State of Kentucky. Filed February 20th, 1905. File No. 19,639.

No. 184. OF OCTOBER TERM, 1905.

Supreme Court U. S.
FILED
JAN 5 1906
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

The Travelers' Insurance Company, of Hartford, Conn., Plaintiff in Error,

vs.

Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
JOHN D. DOOLAN,
ATTILLA COX, JR.,
WILLIAM BRO SMITH,
For Plaintiffs in Error

Allen Lane & Scott Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

The Travelers' Insurance Company, of Hartford, Conn., Plaintiff in Error,	
vs.	October Term, 1905.
Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, Defendant in Error.	No. 184.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This writ of error is to the judgment of the Court of Appeals of Kentucky, entered against plaintiff in error December 15th, A. D. 1904. (83 S. W. Rep., 611.)

The question involved is whether or not a State may, by its legislation, impose upon a foreign corporation admitted to its territory, the penalty of expulsion for refusal to surrender its right of resort to the Federal courts.

The facts are that plaintiff in error, on the tenth day of October, 1904, filed its petition in the Jefferson Cir-

cuit Court, praying an injunction to restrain the Insurance Commissioner from canceling its warrant of authority to transact business in Kentucky. (Record, page 1.) It averred that this authority, pursuant to statutory provision, had been granted by the Commissioner July 1st, 1904, to continue for the next ensuing year, and that licenses in accordance therewith had been issued to its agents covering the same period. It alleged, specifically, facts showing compliance with all other requirements of Kentucky statutes; that this was well known to the Commissioner; but that because of its removal to the Federal court of an action instituted against it in said court by one Frankel and others, No. 37,160, said Insurance Commissioner threatened to cancel, and unless enjoined, would cancel, said authority to transact business in Kentucky. It further averred that its business was large and valuable, and that the cancellation of its authority to transact the same would cause it irreparable injury. It specially set up and claimed, that its right of removal, was inviolate under the guarantee of the Federal Constitution and laws.

A demurrer to the petition was sustained (Record, page 4), and the petition was dismissed. (Record, page 10.) This judgment was affirmed, upon appeal, by the court of last resort in the State. (Record, page 11.)

The Commissioner's threatened action was based upon section 631, Kentucky Statutes, which is as follows:—

> "Before authority is granted to any foreign insur-
> "ance company to do business in this State, it must
> "file with the Commissioner a resolution adopted by
> "its board of directors, consenting that service of
> "process upon any agent of such company in this
> "State, or upon the Commissioner of Insurance of this
> "State, in any action brought or pending in this
> "State, shall be a valid service upon said company;
> "and if process is served upon the Commissioner it
> "shall be his duty to at once send it by mail, ad-
> "dressed to the company at its principal office; and
> "if any company shall, without the consent of the

"other party to any suit or proceeding brought by "or against it in any court of this State, remove said "suit or proceeding to any Federal court, or shall in- "stitute any suit or proceeding against any citizen of "this State in any Federal court, it shall be the duty "of the Commissioner to forthwith revoke all au- "thority to such company and its agents to do busi- "ness in this State, and to publish such revocation in "some newspaper of general circulation published in "the State."

The statutory provisions in point, and in the context are found in section 633, which provides:—

"Licenses to agents of foreign companies must be "renewed annually in the same manner as original "licenses, upon a finding by the Commissioner that "the company represented by the agent has fully "complied with the law, and maintains its required "capital or reserve; and whoever solicits and receives "application for insurance on behalf of any insur- "ance company, or transmits for any person other "than himself an application for insurance, or a policy "of insurance to or from such company, or adver- "tises that he will receive or transmit the same, or "who shall, in any manner, directly or indirectly, "aid or assist in transacting the insurance business "of any insurance company, shall be held to be an "agent of such company within the meaning of this "article, anything in the policy or application to the "contrary notwithstanding; and any person acting as "the agent of any company within the meaning of "this section, without first procuring and having a "license from the Commissioner to act as such agent, "or, after such license has expired, been suspended "or revoked, or who shall procure any premium or "obligation therefor by fraudulent representations, "shall be deemed and held to be guilty of a misde- "meanor, and, upon conviction for such offense, shall "be fined not less than fifty nor more than one hun- "dred dollars for each offense."

Section 634 reads:—

"Every insurance company not organized under "the laws of this State, before transacting any busi- "ness in this State, if it has not already done so, shall "return to the Commissioner a copy of its charter, "articles of association, or deed of settlement, by "whatever name its organic law may be called, and "the Commissioner, upon being satisfied that such "company has fully complied with the laws of this "State, and is possessed of the legal reserve, shall "furnish to such agents as the company directs a "license to transact business as agent for said com- "pany under the seal of the Insurance Department."

Section 638 reads:—

"If insurance is made by any company as au- "thorized by this law to be made, but without a com- "pliance with the requirements of the laws of this "State, the contract shall be valid; but the agent or "person making the insurance shall be liable to a "fine not exceeding one thousand dollars for each "offense."

Section 752 provides for examination of the *status* of each insurance company, and, in the event of a refusal to permit an examination by the Commissioner, directs that "he shall revoke the certificate of authority and "license of such company and its agents;" and section 753 provides:—

"If he (Insurance Commissioner) is of the opinion, "upon examination or other evidence, that a foreign "insurance company is in an unsound condition, or if "it has failed to comply with the law, or if its officers "or agents refuse to submit to examination or to "perform any legal obligation in relation thereto, or, "if a life insurance company, that its actual funds "are less than its liabilities, he shall revoke or sus- "pend all certificates of authority granted to it or "its agents, and shall cause notifications thereof to

"be published in some newspaper of this State hav-
"ing general circulation therein; and no new busi-
"ness shall thereafter be done by it or its agents in
"this Commonwealth while such default or disability
"continues, nor until its authority to do business is
"restored by the Commissioner. If, upon examina-
"tion, he is of opinion that any domestic insurance
"company is insolvent, or has exceeded its powers,
"or has failed to comply with any provision of law,
"or that its condition is such as to render its further
"proceedings hazardous to the public or to its policy
"holders, he shall revoke or suspend all licenses is-
"sued to it or its agents, and cause notice thereof
"to be published in some paper having general circu-
"lation in the State; and it is hereby also made the
"duty of the Commissioner to immediately notify
"the general agents of the foreign or domestic com-
"pany suspended of the suspension, and it shall be
"the duty of said agents to immediately notify per-
"sons insured by them of such suspension by the Com-
"missioner, and for failure so to do upon the part of
"the Commissioner, or agent, he shall be fined not
"less than fifty nor more than one hundred dollars for
"each offense; he shall also apply to the judge of the
"Franklin Circuit Court or the judge of the Circuit
"Court where the company is located, to issue an in-
"junction restraining it in whole or in part from fur-
"ther proceeding with its business. Such judge may,
"in his discretion, issue the injunction forthwith, or
"upon notice and hearing thereon, and after a full
"hearing of the matter may dissolve or modify such
"injunction or make it perpetual; and may make all
"orders and decrees needful in the premises, and
"may appoint agents or receivers to take possession
"of the property and effects of the company, and to
"settle its affairs subject to such rules and orders as
"the court may from time to time prescribe, accord-
"ing to the course of proceedings in equity: *Provided*,
"That if any injunction issued hereunder be dis-
"solved, and the court or judge dissolving the same
"shall not state in the order or decree of dissolution
"that there were reasonable grounds for procuring

"such injunction, the cost of such proceeding shall "be taxed and paid out of the funds of the Insurance "Department."

Assignment of Errors.

The errors assigned are to the error of the State court in holding that section 631 of the Kentucky statutes aforesaid, did not offend the Federal Constitution in directing the Insurance Commissioner of the State to cancel the license of any foreign insurance company which instituted an action in the Federal court, or which removed thereto, any action instituted against it in the State court.

Argument.

The gist of the decision adverse to the plaintiff in error in the State court, is, that although the right of removal to the Federal courts is one guaranteed by the Federal Constitution and statutes and is one which cannot be impaired by State legislation, nevertheless the impairment of the Federal right so guaranteed may be accomplished indirectly, either by requiring the corporation possessing the right to consent to its surrender, upon penalty of expulsion from the State, or by admitting it into the State under a grant of authority to transact business, coupled with the condition that it shall never exercise the right.

In support of this position, the contention is, that no Federal right is impaired; that the State does not forbid the foreign corporation to exercise the right, nor punish it for exercising it, but simply requires it to leave the State in case it shall be unwilling to forego its exercise. The court says:—

"The validity of the latter clause of the section "(section 631) is the only question to be determined

"upon the appeal. It is insisted that it is in conflict "with the Constitution of the United States. (Rec- "ord, page 13).

"Our statute is not liable to the objections made "to the statute in either the Morse case or the Bar- "ron case. Under our statute the foreign insurance "company is at liberty to remove its cause to the "Federal Court whenever it sees proper. It is re- "quired to sign no stipulation or agreement interfer- "ing with that right. The regulation is reasonable "that the State for the protection of its citizens "against unsafe insurance companies should require "them before doing business in the State to obtain "a license," &c. "The license which the State "grants is purely a matter of grace, and like any "other license may be revoked by the licensor at "pleasure. The revocation of the license interferes "with no legal right of the licensee; for when he takes "it he takes it subject to revocation. He cannot "question the reason of the licensor for revoking the "license, as the State may exclude foreign corpora- "tions from doing business in the State with or with- "our reason."

"The State, by her statutes above referred to, in "effect, says to the foreign insurance companies, 'I "'will license you to do business here on the same "'plane as domestic corporations, and if you come "'here you must stand on no more favorable ground "'than the domestic insurance companies. If after "'you come, you refuse to so stand I will withdraw "'my license.'" (Record, page 17.)

The court then declares that the reason of the statute is, not distrust of Federal courts, but a practical denial of justice in view of the distance to the Federal court in a sparsely-settled State, &c.

The dissenting judges declare:—

"The question presented by these records is "whether a State may enact a valid law, which shall "present to a foreign corporation the alternative "either of surrendering its right, under the provi-